BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities	)	**MM Docket No. 97-182**

COMMENTS OF THE NATIONAL BUSINESS AVIATION ASSOCIATION

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October 30, 1997

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The National Business Aviation Association, Inc. ("NBAA") submits these comments on the captioned petition for rulemaking filed by the National Association of Broadcasters and the Association for Maximum Service Television ("Petitioners").

Summary of Filing

NBAA represents the interests of the business aviation community. The captioned petition for rulemaking could, if adopted, have a substantial adverse impact on that community as well as on all aviation and the public.

The gist of the petition is that the rapid implementation of digital television ("DTV") service requires the end of state and local regulation of antenna tower siting, placement and construction. Petitioners propose, in effect, two rules to accomplish that result.

The first proposal would prevent state and local authorities from considering technical radio frequency emission ("RFE"), radio interference and tower marking/lighting issues in reviewing the siting, placement and construction of antennae. The RFE issue is beyond NBAA's purview, but radio interference and tower

marking/lighting issues are important to the aviation community and to state and local authorities. Petitioners have not shown why these interests should be set aside in the name of "rapid implementation."

The second proposal is even more serious since it would preempt all state and local authority with respect to any broadcast antennae. It would preempt non-federal regulation of the one thousand or more antenna structures to be built or modified for DTV in the next few years. It also would preempt non-federal regulation of at least seventy-five thousand other tower structures in the U.S. In short, it would give the Commission, working with the technical expertise of the FAA, the sole responsibility for assuring that antenna structures do not interfere with airspace.

NBAA does not believe that the Commission should be put in this position, either with respect to DTV towers or all towers. There is more than sixty years of experience and compromise built into the dual system of federal and non-federal regulation of these structures. The system may be weak, but it should not be made even weaker by excluding the participants who have the most direct interest and the best and most current knowledge of what is occurring. The rule proposed by Petitioners is almost guaranteed to create substantial problems for everyone, including its proponents. There are simply too many towers and too few federal regulators to make it work.

Background

1. NBAA represents the interests of more than 5,100 companies who own or operate more than 6,500 general aviation aircraft as an aid to the conduct of their business. General aviation aircraft used for business purposes have access to more than 5,500 airports in the U.S., more than ten times the number available to the airlines. The proliferation of antenna structures remains a concern to the entire aviation community. While there has not been a fatal accident involving a broadcast antenna structure since 1986,[1/] incidents involving these structures are not uncommon.[2/] At the same time, an improperly sited antenna tower can render an airport useless.

2. Antennae and other structures which might obstruct airspace presently are subject to review at the federal level and regulation at the non-federal level. This is the product of a complex balancing of competing interests developed over the more than six decades since travel by air became a national enterprise. Congress recognized that concerns about local construction are best addressed at the local level, even when those concerns implicate federal interests.

1/ In June, 1986, a general aviation aircraft struck the guy cable of a tower at 534 feet above ground level near Elizabethtown, Kentucky. There was one fatality. NTSB Accident/Incident Database Report, No. ATL86FA155.

2/ For example, on June 1, 1997, the Ground Proximity Warning System on a commuter airline flight sounded an alert on approach to Syracuse, New York. There was a newly constructed antenna tower in the area which is believed to have been the cause of the alert. FAA Incident Data System, No. 970601017739C.

FAA Review

3. At the federal level, the FAA and the Commission share review responsibility. The FAA's role is technical in nature. Acting pursuant to its statutory authority to require notice and to conduct studies of intrusions into airspace, 49 U.S.C. § 44718, the FAA has issued regulations defining the structure siting specifications which require notice to be given, e.g., any structure more than 200 feet above the ground. 14 C.F.R. § 77. A structure falling within the Part 77 parameters is considered an obstruction, and notice triggers an obstruction evaluation ("OE") by the FAA.

4. Even the considerable resources of the FAA are taxed by the OE process:

> The increased use of new telecommunications technology (e.g., cellular telephone service and paging devices in particular) has led to a rapid increase in OE activities. The FAA currently struggles to process more than 17,000 OE notices a year and anticipates a significant rate of OE notices each year through the end of the decade.

FAA, Business Process Improvement Handbook of Standards and Guidelines, Appendix D § 2.0 (November 30, 1995). The OE is used to make a determination of "hazard" or "no hazard." Although that determination has no enforceable legal effect by itself, it does bear a role in the Commission's licensing process and in state and local zoning considerations. See, e.g., Airline Owners and Pilots Association v. Federal Aviation Administration, 600 F.2d 965, 966-67 (D.C. Cir. 1979).

Commission Review

5. The Commission's role is more direct but still not that of traditional regulatory enforcement. The Commission's public interest, convenience and necessity licensing authority includes the responsibility to assure that antenna structures are not endangering air safety:

> The Commission has always considered air navigation safety of the utmost importance, and we cannot allow our licensees to take a cavalier attitude toward the very real hazard that their antenna towers can cause to air safety . . . Any compromise in our position on tower safety issues would frustrate the core purpose of the Act.

In re Centel Cellular Company of North Carolina Limited, 11 FCC Rcd. 10800, 10809 (1996). The Commission implements this responsibility through regulations which require the owner of a proposed antenna structure (or improvement or addition thereto) subject to notification under the FAA's Part 77 standards to register that structure with the Commission. The registration must include the FAA's "no hazard" determination. If that determination is not included, the Commission may delay or dismiss the application. 47 C.F.R. §S 17 and 22.165. It does not have to do so, however, and that speaks to the weakness inherent in federal review of these structures.

6. As of 1995, there were approximately 500,000 antenna structures in the U.S., 75,000 of which required notification to the FAA under Part 77.[3/] To a large extent, federal regulation

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[3/] See, In the Matter of Streamlining the Commission's Antenna Clearance Procedure, 11 FCC Rcd 4272, 4275 (1995).

works on the honor system, i.e., the Commission "must rely upon the licensees to police themselves and comply with all applicable tower construction rules." Centel, supra., at 10807. This system is less than perfect. In Centel, for example, a licensee constructed a tower two miles from an airport and within its Part 77 air safety zone. After completing construction, the licensee filed Form A-428 with the Commission and listed an FAA determination of "no hazard" for a different tower. It was only after diligent inquiries by the Commission staff that it became apparent that the licensee simply had ignored the applicable requirements. A two million dollar civil penalty and reducing the height of the tower addressed the immediate situation, but the basic regulatory problem remains: too many towers and too few federal regulators.

Non-Federal Regulation

7. The concurrent scheme of non-federal regulation fills in that enforcement gap. For example, as a matter of federal law, airport operators receiving any federal financial support must covenant as follows:

> (9) appropriate action will be taken to ensure that terminal airspace required to protect instrument and visual operations to the airport (including operations at established minimum flight altitudes) will be cleared and protected by mitigating existing, and preventing future, airport hazards;
>
> (10) appropriate action, including the adoption of zoning laws, has been or will be taken to the extent reasonable to restrict the use of land next to or near the airport to uses that are compatible with normal airport operations.

49 U.S.C. § 47107 (a).

8. Acting consistent with this mandate to take "appropriate action," many states have enacted laws which import the Part 77 standards and notice procedures into local airport-related regulation. Maryland and Virginia are nearby examples of this practice. Maryland Code, § 5-702 of the Transportation Article; Virginia Code, § 5.1-25.1. This is both a backstop to federal regulation and an expression of the states' legitimate concern and authority over a basic public safety issue. Local zoning ordinances often go beyond the Part 77 standards and impose more stringent limitations on height and location. Again, this is a reflection of legitimate local concerns as well as another level of screening on the basic safety issue.

9. The result is a process which exists at a number of levels. It reflects compromises arising from legitimate but competing policy objectives: maintaining the highest possible air safety, preserving the integrity of the national airport/airways system, meeting local concerns and, at the same time, permitting growth in the broadcasting industry. If the process is to be changed, it should be strengthened, not further weakened.

The Proposed Rules

Specific Preemption

10. Petitioners have, in effect, proposed two rules. The first proposal specifically would preempt:

> (i) the environmental or health effects of radio frequency emissions to the extent that such facility has been determined by the Commission to comply with the Commission's regulations and/or policies concerning such emissions;

(ii) interference effects on existing or potential telecommunications providers, end users, broadcasters or third parties, to the extent that the broadcast antenna facility has been determined by the Commission to comply with applicable Commission regulations and/or policies concerning interference;

(iii) lighting, painting, and marking requirements, to the extent that the facility has been determined by the Federal Aviation Administration ("FAA") or the Commission to comply with applicable FAA and Commission regulations and/or policies regarding tower lighting, painting and marking.

11. NBAA has no comment on the issue of RFE preemption. Radio interference and tower marking/lighting are, however, issues which directly impact the aviation community and which invoke the attention and jurisdiction of state and local regulators. If a DTV broadcast tower will interfere with radio frequencies used by aviation, it should not be a matter of concern just for the Commission and the FAA. State aeronautical authorities, who often also are the owners and/or operators of airports, should be able to exercise their regulatory jurisdiction.

12. Similarly, tower lighting and marking requirements are of direct interest to both state and local authorities. States can and may impose requirements in addition to those imposed by the FAA and which respond to unique local conditions. Local zoning authorities, on the other hand, may restrict tower siting because of the mandated lighting. These issues can best be sorted out in the communities in which they arise, not in Washington, D.C.

Blanket Preemption

13. Petitioners plainly overreach in the name of "rapid implementation" with their second proposal:

> Any state or local land-use, building, or similar law, rule or regulation that impairs the ability of federally authorized radio or television operators to place, construct or modify broadcast transmission facilities, is preempted . . .

This preemption provision would be inapplicable only if the state or local authority could demonstrate that the rule or regulation was reasonable under a standard weighted heavily in favor of preemption. It would preempt all state and local regulation (for any reason) of all antenna structures (not just DTV). As a practical matter, this rule, if adopted, would leave antenna regulation solely up to the Commission/FAA review process.

14. Only one thing is certain: total preemption would be dangerous, not only in terms of air safety but in the context of the political and business consensus necessary to make "rapid implementation" work. The spectacle of one thousand or more television towers under construction in the next few years is not going to be well-received by the public if those structures begin intruding into airspace without any state or local regulatory input, the more so if they are followed by tens of thousands of other structures also excepted from state and local controls.

15. The sensitive issue of liability in the event of an aviation accident also requires serious consideration. There is limited precedent for the proposition that the Commission and the FAA bear no liability for negligently allowing towers to be

constructed. Reminga v. United States, 631 F.2d 449, 457-58 (6th Cir. 1980). This is based on the discretionary authority exception in the Federal Tort Claims Act, 28 U.S.C. § 2680 (a), an exception which would be undercut if the federal government undertook the sole responsibility for authorizing tower siting, placement and construction.

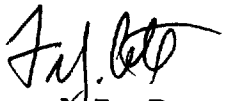
16. The converse, the liability exposure of the private parties involved -- tower owners, tenant licensees and landlords -- also should be a concern. To the extent that compliance with law or regulation is a defense, that defense is weakened by the elimination of state and local screening processes. This, in turn, will be reflected in the marketplace through increased economic friction in the financing process and higher insurance premiums.

17. If the Commission has evidence that rapid implementation is not possible without preemption on the scale proposed by Petitioners, and if it is prepared to accept the concerns expressed above as the price for expedition, it had best be prepared to take the final step: a massive commitment, working in conjunction with the FAA, to policing the construction and alteration of antenna structures throughout the U.S. The Commission will be required to step into the role of each and every state and local authority which presently has a role in the antenna siting, placement and construction process.

Conclusion

The rule proposed by Petitioners appears unnecessary, overbroad and more than a little dangerous. If adopted, it would require the Commission and the FAA to devote substantial resources -- more resources than they presently have available -- to, in effect, serving as local zoning bodies for thousands of antenna structures. The present system of dual federal and non-federal regulation is not perfect, but it should not be made even weaker by removing from the system the state and local parties who often have the most at stake. The petition for rulemaking should be denied.

Respectfully submitted,



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Certificate of Service

I certify that a copy of these Comments was served today by first class mail, postage prepaid, upon the Petitioners and their counsel at the addresses below:

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October 30, 1997